88-1933

No. _____

SUPREME COURT, U.S.
FILED
MAY 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1988 - 1989

JAMES N. CONSTANT,

Petitioner

v.

ADVANCED MICRO-DEVICES, INC., et al.,

Respondents *

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

James Constant
1603 Danbury Drive
Claremont, CA 91711
(714) 624-1801

Pro se petitioner

---

* see APPENDIX A for a complete list of all Respondents

QUESTIONS PRESENTED FOR REVIEW

1. Is petitioner's compliance with Form 16 "Complaint for Patent Infringement" contained in the Appendix of Forms of the Federal Rules of Civil Procedure sufficient to withstand attack under the Federal Rules.

2. Are orders to replead the original and amended complaint with greater specificity, under FRCP 12(e), error because the requested information was available to appellees in petitioner's motions for summary judgement for infringement of the patent previously dismissed by the court and because TI had filed answers to both the original and amended complaints.

3. Was petitioner's notice of voluntary dismissal of the case effective to terminate the action and the district court's jurisdiction and to preclude the district court from holding ancillary

proceedings to enforce interlocutory orders made before the notice of voluntary dismissal was filed and to preclude the district court from the making of new orders, including the final order of involuntary dismissal, after the notice of voluntary dismissal was filed.

4. Can the complaint be dismissed with prejudice for petitioner's conduct that does not violate the language of the law under FRCP 84 and FRCP 41(a)(1).

5. Does the dismissal with prejudice take petitioner's property without just compensation and does it deprive petitioner's liberty and property without due process of law.

6. Do ordered sanctions under FRCP 38 and FRCP 11 deprive petitioner's liberty and property without due process of law and do these rules deny pro-se petitioner's equal protection.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT .	7
1. Official Form Pleading . .	7
2. Repleading Orders	9
3. Voluntary Dismissal . . .	11
4. Involuntary Dismissal. . .	12
5. Plain Meaning of Rules . .	16
6. 5th Amendment Taking and Due Process	19
7. The Congressional Policy Favors Patent Actions . .	24
8. Arbitrary Sanctions . . .	25
CONCLUSION	33

TABLE OF AUTHORITIES

Cases	Pages
Armstrong v. Frostie 453 F2d 914,916 (CA4 1971) . . .	13,18
Bolling v. Sharpe, 347 US 497 (1954	31
Brown v. Federation of State Medical Boards, 830 F2d 1429 (CA7 1987) .	29
Bryan v. Smith, (CCA7 1949), 174 F2d 212, 12 FRServ 41a.26, Case 1, 11 ALR2d 1402 . .	11,18
Business Buyer's of New England v. Gurham, 1FRServ3d 161 ___F2d ___ (CA1 1985)	15
Cleveland Board of Education v. LaFleur, 414 US 632 (1974) . . .	23,31
CMAX, Inc. v. Hall, 290 F2d 736 (CA9 1961)	9,18
Coleman v. Darden, 595 F2d 533 (CA10 1974), cert den 100 S Ct 267, 444 US 927, 62 LEd2d 184	23,31
Constant v. AMD 7 USPQ2d 1057 (CAFC 1988) . . .	5
Etablissments Nevpric v. Elmer C. Gardiner, Inc., 175 F Supp 355, 122 USPQ 493 (SD Tex 1959) . . .	10,18

Cases — Pages

Famolare, Inc. v. Edison Bros Stores, Inc., 525 F Supp 940, 211 USPQ 562 (ED Cal 1981) 10,18

Fischer & Porter Co. v. Sheffield Corp., 31 FRD 534 (DC Del 1962) . 9,18

Fluoro Electric Co. v. Bradford Associates, 489 F2d 320 (CA2 1972) 26

Frantz v. U.S. Powerlifting Federation, 836 F2d 1063 (CA7 1987) . . 29

Gaiardo v. Ethyl Corp., 835 F2d 479 (CA3 1987) 28

Harvey Aluminum v. American Cyanamid Co., 203 F2d 105 (CA2), cert den 345 US 964 (1953) 14,15,18

Hawaii Housing v. Midkiff, 104 S Ct (1984) 20,21

Illinois Brick Co. v. Illinois, 431 US 720, 52 LEd2d 707, 97 S Ct 2061, reh den 434 US 881, 54 LEd 2d 164, 98 S Ct 243 26

INVST Financial Group Inc. v. Chem-Nuclear Systems, Inc., 815 F2d 391 (CA6 1987) 29

Los Angeles Brush v. James, 272 US 701 (1927) 9

Cases	Pages
La Buy v. Howes Leather Co., 352 US 249 (1957)	9
McCullough v. Cosgrove, 309 US 634 (1940)	9
MGA Inc. v. General Motors Corp., 827 F2d, 3 USPQ2d 1762 (CAFC 1987)	28
Monroe Equipment Co. v. NLRB, 511 F2d 611 (CA5 1975), 89 BNA LRRM 2104, 76 CCH LC #10798, 20 FRServ2d 956	26
Nassau-Suffolk Ice Cream Inc. v. Integrated Resources Inc., 114 FRD 684 (SNY 1987)	29
Tedesci v. Barney, 95 FRD 182,183 (SDNY 1982) . . .	13,18
Thomas v. Capital Security Services, Inc., 836 F2d 866 (CA5 1988) . .	29
U.S. v. Spector, Cal. 1952, 72 S Ct 591, 343 US 169, 96 LEd 863, reh den 72 S Ct 1040, 343 US 951, 96 LEd 1088	24
Vlandis v. Kline, 412 US 441 (1973)	23,31
Washburn v. Moorman 25 F.Supp. 546 (SD Cal 1938) . .	7

Cases	Pages
West Virginia v. Chas. Pfizer & Co., 440 F2d 1079 (CA2 1971) cert den 404 US 871, 30 LED2d 115, 92 S Ct 81 (disapproved on other grounds Illinois Brick Co. v. Illinois supra	26,27,28
Will v. United States, 389 US 90,95-96 (1987), 88 S Ct 269, 19 LEd2d 305	9
Statutes	
28 USC 1254(1)	1
35 USC 271(d)(3)	24
Federal Rules of Civil Procedure	
Rule 11	29,31
12(b)(6)	2,3,4,6, 13,15
12(e)	8,10,18
41(a)(1)(i)	2,11,16,18
41(b)	8,20,22, 23,27
84	7,18
Federal Rules of Appellate Procedure	
Rule 38	26,28,31

United States Constitution	Pages
1st Amendment	31
5th Amendment	19-24, 30-32

Other Authorities

11 ALR2d 1407 and Supp 437 . .	11,18
FAWCETT, "Eminent Domain, the Police Power, and the 5th Amendment", 47 U.Pitt.L.R. 491	19,20,21
Federal Circuit Informal Rule 17 p 77 Rules of Practice CAFC .	31
Federal Circuit Rule 47.9 . .	25

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, James Constant, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit decided 11 April, 1988 attached as APPENDIX A.

OPINION BELOW

The Court of Appeals for the Federal Circuit issued its decision affirming the "Order Dismissing Amended Complaint With Prejudice" of the United States District Court for the Central District of California attached as APPENDIX B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1).

STATEMENT OF THE CASE

Petitioner filed a complaint for patent infringement by AMD,AD,AT&T,FPS, FL,FMI,NEC,TI. By order 17 June, 1988 (App B Brief on Appeal) the district court denied petitioner's infringement motions against appellees and ordered petitioner to replead the original complaint. By bench order at the hearing on 29 August, 1988 (App C Brief on Appeal) the district court granted appellee's Rule 12(b)(6) motion to dismiss the amended complaint for failure to state a claim and ordered the petitioner to replead the amended complaint. Petitioner lodged a notice of voluntary dismissal under FRCP 41(a)(1)(i) on 16 September, 1988 which was entered by the district court on 22 September, 1988.

At the time the notice of voluntary dismissal was filed the amended complaint had been dismissed without prejudice for failure to state a claim under Rule 12(b)(6). Appellees AD, AT&T, NEC had filed an answer to the original complaint but had not filed an answer to the amended complaint nor did they move for summary judgement. Appellees FPS, FMI had not filed an answer to either the original or amended complaints nor did they move for summary judgement. Appellees FL,TI were not dismissed by the notice of voluntary dismissal. FL had not filed an answer to either the original or amended complaints nor did it move for summary judgement but did, on motion, request to dismiss for lack of personal jurisdiction and alternatively for more definite statement. TI had filed answers to both the original and amended complaints.

After the notice of voluntary dismissal was filed the district court held ancillary proceedings to enforce interlocutory (repleading) orders made before the notice of voluntary dismissal was filed, and the district court made new orders (sanctions, dismissing amended complaint with prejudice as to all defendants). Appellees filed motions for sanctions against the petitioner for his opposition to their Rule 12(b)(6) motions to dismiss the amended complaint for failure to state a claim and renewed their Rule 12(b)(6) motions to dismiss the amended complaint. At the hearing on 3 October, 1988 the district court ordered dismissing the case with prejudice as to FL,TI and the court affirmed petitioner's notice of dismissal of the remaining defendants without prejudice. Appellees

requested reconsideration of the order dismissing without prejudice. By final order APPENDIX B entered 31 October, 1988 the district court dismissed the amended complaint with prejudice as to all defendants. The final order APPENDIX B holds that the original and amended complaints did state a claim (App B-5 13-14,23,B-6 1-2,20,B-7 1-2,B-10 10-11) and grounds on "failure to comply with the court's order to replead with specificity" (App B-8 18-20).

On appeal, petitioner requested review of the district court's (1) order transferring the case from Judge Ideman to Judge Wilson (*), (2) order denying

---

* Judge Wilson presided over petitioner's earlier case in Constant v AMD 7 USPQ2d 1057 (CAFC 1988) and was named as a defendant in petitioner's suit 88-1195 (CAFC 25 August, 1988) alleging fraud in the procurement of the judgement in the earlier case

sanctions against FMI,TI for their filing Rule 12(b)(6) motions and ordering the petitioner to show cause why he should not be sanctioned for his opposition, and order denying petitioner's infringement motions, and (3) orders dismissing the original and amended complaints, orders for repleading the original and amended complaints, order granting appellee's Rule 12(b)(6) motion to dismiss the amended complaint for failure to state a claim, order denying petitioner's motion for entry of default, order for sanctions against petitioner, and the final order dismissing the amended complaint with prejudice APPENDIX B.

The appeals court APPENDIX A affirmed the district court's order APPENDIX B and denied the petitioner's Petition for Rehearing (App A-7). Both courts below sanctioned the petitioner (App A-8,B-21).

REASONS FOR GRANTING THE WRIT

1. Official Form Pleading

The 1946 amendment to FRCP 84 states expressly that the Official Forms are sufficient under the Rules.

> "The amendment serves to emphasize that the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are drawn and that the practitioner using them may rely on them to that extent. The circuit courts of appeals have upheld the use of the forms as promoting desirable simplicity and brevity of statement. (Citations omitted). And the forms as a whole have met with widespread approval in the courts. (Citations omitted). The amended rule will operate to discourage isolated results such as those found in Washburn v. Moorman Mfg Co., SD Cal 1938". * Note of Advisory Committee on 1946 Amendment to FRCP 84.

---

* Washburn v. Moorman Mfg Co., 25 F. Supp. 546 (SD Cal 1938) was cited by the district court (App B-8) to support dismissal of petitioner's amended complaint

The function of a complaint under the Rules is to afford fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved. If there are additional facts needed, the discovery processes are available. Since the original and amended complaints did comply with Form 16 Appendix of Forms (App B-5,B-6,B-7,B-10) (*), appellee's motions to dismiss, for more definite statements, and for sanctions, and the district court's orders under FRCP 12(e) (repleading orders for greater specificity) and under 41(b)(dismissal of the amended complaint for failure to obey repleading orders) are impermissible under FRCP 84.

---

* Examination of the original and amended complaints shows that much more than the Form 16 pleadings in paragraphs 1-4 of each complaint are involved. The original complaint has 19 allegations and 2 evidentiary EXHIBITS 1 and 2. The amended complaint has 10 allegations and 12 evidentiary EXHIBITS 3A through 8B. See Brief on Appeal 15-16

The Court need not consider the remaining part of the argument hereinbelow since writs (in the form of mandamus) have been invoked where a district court displays a persistent disregard of the Rules of Civil procedure promulgated by this Court. Will v. United States, 389 US 90, 95-96 (1967), 88 S Ct 269, 19 LEd2d 305 citing La Buy v. Howes Leather Co., 352 US 249 (1957); McCullough v. Cosgrave, 309 US 634 (1940); Los Angeles Brush v. James, 272 US 701 (1927).

2. Repleading Orders

The information requested by the district court's repleading orders was available in petitioner's motions for summary judgement of infringement by appellees denied by the court's repleading order 17 June, 1988 (App B Brief on Appeal) and through discovery. CMAX, Inc. v. Hall, 290 F2d 736,738 (CA9 1961)(An order which

attempts to discover evidentiary matters is inappropriate under the systems of pleading provided by the federal rules); Fischer & Porter Co. v. Sheffield Corp., 31 FRD 534 (DC Del 1962)(In a patent case a party may not be compelled under Rule 12(e) to compare patent claims with his own or his opponent's devices); Famolare, Inc. v Edison Bros Stores, Inc., 525 F Supp 940,949, 211 USPQ 562,570 (ED Cal 1981)(design patent case holding that "where the information sought by the moving party is available and/or properly sought through discovery the motion should be denied"); Etablissments Neypric v. Elmer C. Gardiner, Inc., 175 F Supp 355,358, 122 USPQ 493,495 (SD Tex 1959)(patent case in which a Rule 12(e) motion was denied because the requested information was not necessary to respond to the pleading and discovery was available to disclose the information).

3. Voluntary Dismissal

The petitioner has a right to make a voluntary dismissal of his complaint pursuant to FRCP 41(a)(1)(i) under which the court loses all jurisdiction over the action and is precluded from holding ancillary proceedings to enforce its interlocutory orders made before the notice of voluntary dismissal was filed and from making any new orders after the notice of voluntary dismissal was filed. 11 ALR2d 1407 and Supp. 437 (Rule that dismissal leaves situation as if suit had never been filed and nullifies previous rulings and orders in the case); Bryan v. Smith, (CCA7 1949), 174 F2d 212,215, 12 FRServ 41a.26, Case 1, 11 ALR2d 1402 (reversing district court proceeding to enforce an interlocutory order). The orders made at the hearing on 3 October, 1988 (App C Brief on Appeal) and the order dismissing

the amended complaint with prejudice (App D Brief on Appeal) entered on 31 October, 1988 are error because they were made after the petitioner filed his notice of voluntary dismissal on 16 September, 1988. At the time the notice of voluntary dismissal was filed the amended complaint had been dismissed without prejudice (App C p 3 lines 23-24, p 8 lines 23-24 Brief on Appeal). The district court had found the complaint "unsatisfactorily general and vague" (App B p 2 lines 14-15 Brief on Appeal) stating, in effect, that appellees were not in position to join issues.

4. Involuntary Dismissals

Having found that petitioner's motions for infringement by appellees were "premature" and that "there remain questions of fact" (Transcript 13 June, 1988 p 11 lines 9-12) for purposes of denying infringement motions, having

dismissed the original and amended complaints without prejudice and, in view of its repleading orders, having found in effect that defendants were not in position to join issues, the district court held that

(a) the AD,AT&T,NEC answers to the original complaint were answers to the amended complaint for purposes of applying the Armstrong and Tedeschi exceptions to nullify the notice of voluntary dismissal and to dismiss the amended complaint with prejudice as to AD,AT&T,NEC (App B-16)(*);

---

* The facts in Armstrong and Tedeschi (where technical issues were joined on merits in both the original and amended complaints) are different from the facts in the present case (where the original complaint was dismissed without prejudice and where the district court had granted the AD,AT&T,NEC motions to dismiss the amended complaint for failure to state a claim under FRCP 12(b)(6)). See bench order at the hearing on 29 August, 1988, Transcript attached as Exhibit C in Brief on Appeal.

(b) "the evidence demonstrated the absence of any genuine issue as to the lack of infringement for purposes of construing the FPS opposition to petitioner's infringement motion as the equivalent of a summary judgement to nullify the notice of voluntary dismissal and to dismiss the amended complaint with prejudice as to FPS (App B-17 4-6)(*); and

(c) "the present litigation has clearly proceeded well beyond an "advanced stage" and that "there have been several motions made, motions to dismiss, a motion for default, and sanctions motions" for the purpose of applying the Harvey exception to nullify the notice of voluntary dismissal and to dismiss the amended complaint with prejudice as to FMI

---

* Here, the district court revives petitioner's infringement motion previously denied and in effect grants summary judgement to FPS

(App B-17). *

Since FL had moved to dismiss for lack of personal jurisdiction and alternatively for more definite statement (Docket Nos 51,56,75,95,104), dismissal of the action was required to be "without prejudice". Business Buyer's of New England, Inc. v. Gurham, 1 FRServ3d 161, ____F2d ____(CA1 1985)(Where defendant had moved to dismiss for want of jurisdiction

---

* The Harvey case stands for the proposition that the right of voluntary dismissal without order of the court may be terminated at an earlier date if the parties actually join issues upon the merits of the controversy so as to allow the court to treat the proceeding as equivalent to an answer or motion for summary judgement. In Harvey, the court found that extensive hearings squarely raised the technical issues. In the present case the district court had granted the FMI motion to dismiss the amended complaint for failure to state a claim under FRCP 12(b)(6)(See bench order at the hearing on 29 August, 1988, Transcript attached as Exhibit C in Brief on Appeal).

prior to the time that the action was dismissed because of plaintiff's violation of local rule, dismissal of the action was required to be "without prejudice". The burden of proving jurisdiction was on the plaintiff once jurisdiction was questioned, and that burden cannot be satisfied by a default).

Since TI had answered both the original and amended complaints, the dissmissal with prejudice as to TI for failure to replead the amended complaint with greater specificity is arbitrary and capricious.

5. Plain Meaning of Rules

From the foregoing it is clear that petitioner's conduct did not violate the language of FRCP 84 for use of the Official Form 16 for pleading his patent complaint or of FRCP 41(a)(1)(i) for the voluntary

dismissal of his case. Yet, the district court found exceptions to these rules (even meritless ones) to make its repleading orders, to nullify the voluntary notice of dismissal, and to dismiss the amended complaint with prejudice for the alleged petitioner's failure to replead. *

The idea that the law consists of objective rules has been supplanted by the view that it is the exception that rules. No longer is the statutory language the sole or even the most significant index of the law. The district court is uncontrolled in its discretion to discover case authorities that overlook and overcome the statute's plain meaning. While case law supporting the language of the statute is

---

* The amended complaint stood dismissed without prejudice at the time petitioner's notice of voluntary dismissal was filed

ignored (*) it is the statutorily discredited (**) and clearly meritless (***) case law that contradict the statute's plain languge that becomes the rule. The willingness of this particular district court (****) to look beyond the unambiguous language of Rules 84 and 41(a)(1)(i) loads the dice against petitioner because

---

* For cases supporting Official Form 16 Pleading see Note of Advisory Committee on 1946 Amendment to FRCP 84. For cases supporting the impropriety of repleading orders under FRCP 12(e) see CMAX, Fischer, Famolare, Etablissments supra. For cases supporting voluntary dismissal see 11 ALR 2d 1407 and Supp. 437, Bryan, supra

** See footnote p 7 supra

*** Armstrong, Tedeschi, Harvey supra have different sets of facts and law. See footnotes at pp 13 and 15 supra

**** Petitioner opposed transferring the case from Judge Ideman to Judge Wilson. See footnote p 5 supra. Petitioner alleges abuses of discretion, partiality and bias in Judge Wilson's court. See Parts B and D in Brief on Appeal.

it encourages appellees, even when the law seems clear, to file impermissible and frivolous motions to dismiss, for more definite statements, and for sanctions in the knowledge that the district court can easily be persuaded to overlook the statute's plain meaning. Such unsupervized discretion to supplant the plain meaning of the federal rules should be limited.

6. 5th Amendment Taking and Due Process

The dismissal with prejudice is a taking under the 5th Amendment because the value of the patent has been diminished. FAWCETT "Eminent Domain, the Police Power, and the 5th Amendment", 47 U.Pitt.L.R. 491 (hereinafter cited as FAWCETT) citation in note 8 and accompanying text. Moreover, where the property taken is put to some use, however limited that use may be (here

infringement use by appellees), compensation is required. In accord with Hawaii Housing v. Midkiff, 104 S Ct 2321 (1984), compensation would be due without further inquiry into the legislative intent of the interfereing statute (here FRCP 41(b)). FAWCETT note 84. On the other hand, where the property is put to absolutely no subsequent use (i.e., no infringement by appellees), a close scrutiny of the legislation is necessary to determine if compensation is necessary. FAWCETT 510-514 citations in notes 85-92 and accompanying text.*

---

* Although the 5th Amendment refers to "public use" as a prerequisite for the exercise of eminent domain, the Supreme Court defines "public use" as the equivalent of "public purpose". FAWCETT 504 citations in notes 63, 34-39 citing S. Ct. cases

The dismissal with prejudice substantially diminishes the value of petitioner's property by prohibiting petitioner from enforcing his patent rights for infringement by appellees. The practical effect of the dismissal with prejudice is that petitioner is unable to exploit his invention and is left with a patent of diminished value. Since the value of petitioner's property has been substantially diminished and since the property taken has been put to some use (infringement use by appellees) the minimum standards of review prescribed in Hawaii Housing, supra are met and compensation under the 5th Amendment is due without inquiring into the legislative intent of the interfering statute FRCP 41(b). FAWCETT 510 note

84. Moreover, even if the property taken is put to no use (i.e., no infringement use by appellees), it is clear that the legislative intent of FRCP 41(b) is to sanction petitioner for his alleged refusal to obey the court's order to replead the amended complaint with greater specificity (APP B p 4 lines 16-20). Since the effect of the involuntary dismissal under FRCP 41(b) operates to adjudicate upon the merits, petitioner's property was taken for the public purpose of FRCP 41(b) and, therefore, compensation is required under the 5th Amendment.

Finally, the due process clause entitles petitioner to a hearing on the merits of his patent claim so that he can prove that in fact the patent was infringed by appellees. The dismissal with prejudice under FRCP 41(b) denies petitioner a hearing on the merits and therefore deprives petitioner's liberty and property without due process. The irrebutable presumption that the patent cannot be asserted against appellees is a violation of the due process clause. Forcing appellant to give up his patent rights against appellees by irrebutably presuming under FRCP 41(b) that the patent cannot be asserted against appellees deprives appellant's liberty and property without due process. Vlandis v. Kline, 412 US 441 (1973); Cleveland Board of Education v. LaFleur, 414 US 632 (1974); Coleman v. Darden, 595 F2d 533 (CA10 1974), cert den

100 S Ct 267, 444 US 927, 62 LEd2d 184 (Statutes creating permanent irrebutable presumptions are disfavored under the 5th and 14th Amendments because they preclude individualized determinations of fact upon which substantial rights or obligations may depend). *

7. The Congressional Policy Favors Patent Actions

The declared policy of the United States under 35 USC 271(d)(3), which approves of patent actions, provides that a patent owner otherwise entitled to relief for infringement shall not be "denied relief . . . by reason of his having . . . (3) sought to enforce his patent rights against infringement". Since the amended complaint

---

* A statute, though plain and unambiguous on its face, may, when applied, violate due process of law. U.S. v. Spector, Cal. 1952, 72 S Ct 591, 343 US 169, 96 LEd 863, reh den 72 S Ct 1040, 343 US 951, 96 LEd 1088

did comply with Form 16 Appendix of Forms and did state a claim (App B-5 lines 13-14, 23-24, B-6 1-2,20, B-7 1-2, B-10 lines 10-11), the petitioner was illegally denied relief on the merits because he sought to enforce his patent rights in Judge Wilson's court which impermissibly required him to replead the amended complaint with greater specificity (App B-8 lines 15-20). *

8. Arbitrary Sanctions

Federal Circuit Rule 47.9 provides that "no application will be granted without an opportunity to submit a response". The order for sanctions of the CAFC (App A-8) was made without giving petitioner the

---

* The requested information was available in petitioner's motions for summary judgement of infringement by appellees denied by the district court's order 17 June, 1988 (App B Brief on Appeal) and through discovery

opportunity to submit a response to appellee's applications for attorney's fees.

Under FRAP 38, the CAFC may award costs and reasonable attorney's fees against a party, where both the Congressional policy and the case law are clearly contrary to the party's position. Monroe Auto Equipment Co. v. NLRB, 511 F2d 611 (CA5 1975), 89 BNA LRRM 2104, 76 CCH LC #10798, 20 FRServ2d 956. However, before assessing sanctions, a court must determine whether the situation is one of those highly unusual instances where the party is guilty of bad faith. West Virginia v. Chas. Pfizer & Co., 440 F2d 1079 (CA2 1971), cert den 404 US 871, 30 LEd2d 115, 92 S Ct 81 (disapproved on other grounds Illinois Brick Co. v. Illinois, 431 US 720, 52 LEd 2d 707, 97 S Ct 2061, reh den 434 US 881, 54 LEd2d 164, 98 S Ct 243); Fluoro Electric

Co. v. Branford Associates, 489 F2d 320 (CA2 1972). There must be a clear showing of bad faith on the part of the party. West Virginia supra.

In the district court petitioner vigorously objected to and opposed the transfer of his case to Judge Wilson who did not give petitioner his full day in court on the merits of petitioner's patent infringement claim. The dismissal with prejudice under FRCP 41(b) operates as an adjudication on the merits and, in effect, invalidates the patent as to appellees. Clearly, the appeal route is the only one available to petitioner to regain his right to enforce his patent on the merits. It was not a frivolous act for petitioner to pursue the only legal avenue available to him in order to regain his patent right. The CAFC cannot

therefore say that petitioner acted in bad faith. In accord with West Virginia, supra, there can be no assessment of sanctions against petitioner without a determination by the CAFC that petitioner acted in bad faith. See also MGA Inc. v. General Motors Corp., 827 F2d 729, 3 USPQ2d 1762 (CAFC 1987)("it was not frivolous for a patent holder to pursue legal avenues available to it to obtain decision with a delineated legal reasoning, and patent holder did not present an argument without foundation").

Moreover, under FRAP 38, fees must be reasonable. On appeal, the attorneys for FMI submitted a brief on behalf of all appellees but each appellee filed a separate application for fees in violation of its duty to mitigate expenses. Clearly, FRAP 38 was used as an excuse to run up unjustified large numbers of hours. Gaiardo v. Ethyl

Corp., 835 F2d 479 (CA3 1987); Thomas v. Capital Security Services, Inc., 836 F2d 866 (CA5 1988)(en banc); INVST Financial Group Inc. v. Chem-Nuclear Systems, Inc., 815 F2d 391 (CA6 1987); Frantz v. U.S. Powerlifting Federation, 836 F2d 1063 (CA7 1987); Nassau-Suffolk Ice Cream Inc. v. Integrated Resources Inc., 114 FRD 684 (SNY 1987).

Under FRCP 11, a sanction should take into account equitable factors such as the sanctioned party's ability to pay. Brown v. Federation of State Medical Boards, 830 F2d 1429 (CA7 1987). In this country, the average citizen makes $25,000 a year and, on average, saves 5% ($1,250). Any costs and attorney's fees which exceed $1,250 would be beyond the citizen's

ability to pay and are therefore inequitable. Arbitrary sanctions which exceed the average citizen's ability to pay will destroy him economically and therefore go far beyond the intended purpose of the statute which provides the sanction. The situation is compounded when the sanction itself is groundless.

The due process clause entitles the petitioner to a hearing so that he can prove that in fact he did not act in bad faith, that appellee's fees are not reasonable, and that his ability to pay is limited. The irrebutable presumptions that such equitable factors are not present deprive patitioner's liberty and property without due process of law. Vlandis, Cleveland Board, Coleman, supra.

Due process under the 5th Amendment also includes protections against denials of equal protection. Bolling v. Sharpe, 347 US 497 (1954). FRAP 38 and FRCP 11 are unreasonable because they arbitrarily and capriciously allow appellee's attorney's fees against pro-se petitioner but do not allow pro-se petitioner's attorney's fees against appellees.

> "Attorney Fees. You are not entitled to payment for your own services in pursuing your case pro se, because only an attorney may be awarded attorney's fees". Federal Circuit Informal Rule 17 p 77 Rules of Practice CAFC

But, even if FRAP 38 and FRCP 11 are reasonable rules, the First Amendment guarantees to petitioner the fundamental right to petition the Government for a

redress of grievances. The Government makes its courts available for the purpose of airing grievances. However, in the courts, attorney's fees are available to appellees who have enough money to hire attorneys. Attorney's fees are not available to petitioner who does not have enough money to hire attorneys. This is a clear denial of equal treatment.

The order for sanctions of the CAFC (App A-8) was made without giving petitioner the opportunity to submit a response to appellee's applications for attorney's fees, without determinations by the CAFC whether the Congressional policy and the case law clearly favor sanctions, whether petitioner acted in bad faith, and whether appellee's fees were reasonable. The order for sanctions of the district court (App B-21) was made without that court's determination

of petitioner's ability to pay. * Sanctions therefore violate the due process clause. Because FRCP 38 and FRCP 11 treat appellees and petitioner differently, they deny equal protection.

CONCLUSION

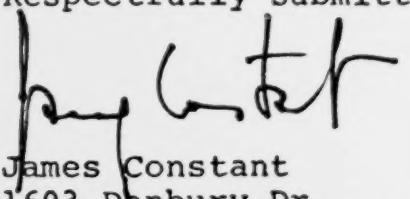
The petition should be granted because the court of appeals has so far sanctioned a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

---

* However, the information was available to the court in connection with the earlier case. See footnote page 5 supra

For the foregoing reasons, petitioner James Constant respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit attached as APPENDIX A.

Respectfully submitted



James Constant
1603 Danbury Dr
Claremont, CA 91711
(714) 624-1801

pro se petitioner

27 May, 1989

A P P E N D I X A

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

89-1122

JAMES CONSTANT,

Plaintiff-Appellant,

v.

ADVANCED MICRO-DEVICES, INC., ANALOG DEVICES, INC., AT&T, FPS INC., FUJITSU LTD, FUJITSU MICROELECTRONICS, INC., NEC ELECTRONICS, INC., and TEXAS INSTRUMENTS, INC.,

Defendants-Appellees.

DECIDED: April 11, 1989

Before MARKEY, Chief Judge, NIES and MICHEL, Circuit Judges PER CURIAM

DECISION

James constant (Constant) appeals from an Order of the United States District Court for the Central District of California, No. 88-00784 SVW (Bx), dismissing his

complaint with prejudice. * We affirm.

OPINION

Constant's contentions on appeal are totally unfounded. They totally fail to manifest even an appearance of an abuse of discretion by the district court.

Transfer of the case to Judge Wilson, before whom a related case was pending, pursuant to Local Rules was not an abuse of discretion. C.D. Cal. R.4. The district court's refusal to award Constant sanctions against Fujitsu Microelectronics, Inc. (FMI) and Texas Instruments, Inc. (TI) for complying with their duty under Local Rules to

---

* Constant previously filed five lawsuits in the district court resulting in two appeals before this court. Constant v. Advanced Micro-Devices, Inc., 848 F2d 1560, 7 USPQ 2d 1057 (Fed. Cir. 1988), cert den, 109 S.Ct. 228 (1988); Constant v. Wilson, Nos 88-1195, 88-1196, 88-1197, 88-1198 (Fed. Cir. Aug. 25, 1988).

notice related cases was not an abuse of discretion.

The district court did not abuse its discretion in denying Constant's motions for: (1) summary judgement as to FPS, Inc. (FPS), Fujitsu Limited (FJ), and FMI because summary judgement would have been premature without opportunity for discovery, FRCP 56(f); (2) judgement on the pleadings and to strike as to Analog Devices, Inc. (AD), NEC Electronics, Inc. (NEC), AT&T, and TI because Constant improperly challenged the district court's ability to determine patent validity, Constant, 848 F2d at 1564, 7 USPQ2d at 1058-59; (3) a more definite statement as to AT&T because AT&T's answer did not require a responsive pleading, FRCP 12(e); (4) judgement on the pleadings as to TI's answer regarding

infringement because factual issues were disputed; and (5) default judgement as to AD, NEC, FPS, FMI, and AT&T because their motion to dismiss constitutes a response to Constant's repleaded complaint within the 20 day time period. FRCP 12(a) and 12(b).

Dismissal of Constant's complaint with prejudice after he refused to obey the district court's order to replead was not an abuse of discretion. FRCP 41(b); Schmidt v. Herrmann, 614 F2d 1221,1224 (9th Cir. 1980).

The district court did not abuse its discretion in sanctioning Constant because Constant's motion for default against TI, after admitting that TI had made a timely answer to Constant's complaint, was vexatious.

There is absolutely no basis whatever for Constant's charge of bias on the part

of the district court.

Having considered these and all other arguments by Constant, we find no abuse of discretion by the district court.

In filing and maintaining this completely unfounded and vexatious appeal, Constant has subjected appellees to unnecessary expenditures and has wasted the resources of this court. Constant shall pay to appellees the costs and attorney fees incurred by appellees in responding to this appeal.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

89-1122

JAMES CONSTANT,

Plaintiff-Appellant,

v.

ADVANCED MICRO-DEVICES, INC., ANALOG DEVICES, INC., AT&T, FPS, INC., FUJITSU LTD, FUJITSU MICROELECTRONICS, INC., NEC ELECTRONICS, INC., and TEXAS INSTRUMENTS, INC.,

Defendants-Appellees.

ORDER

Before MARKEY, Chief Judge, NIES, Circuit Judge, and MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same is hereby is, denied.

FOR THE COURT

Date: 3 May, 1988 Francis X. Gindhart, Clerk

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

89-1122

JAMES CONSTANT,

Plaintiff-Appellant,

v.

ADVANCED MICRO-DEVICES, INC., ANALOG DEVICES, INC., AT&T, FPS, INC., FUJITSU LTD, FUJITSU MICROELECTRONICS, INC., NEC ELECTRONICS, INC., and TEXAS INSTRUMENTS, INC.,

Defendants-Appellees.

Before MARKEY, Chief Judge, NIES and MICHEL, Circuit Judges. PER CURIAM.

ORDER

On April 11, 1989, this court dismissed this appeal and required that James Constant (Constant) reimburse appellees for the costs and attorney fees they incurred in responding to it. Appellees have now filed their Applications for Attorney Fees and Costs, with

supporting documents. The Court having reviewed those applications and supporting documents, it is

ORDERED:

(1) Constant shall pay, before June 15, 1989, to Texas Instruments, Inc., the sum of $13,572 in attorney fees and $342.30 in costs. (Total: $13,914.30).

(2) Constant shall pay, before June 15, 1989, to Fujitsu Limited and Fujitsu Microelectronics, Inc., the sum of $22,970 in attorney fees and $342.30 in costs. (Total: $23,312.30).

(3) Constant shall pay, before June 15, 1989, to NEC Electronics, Inc., and Analog Devices, Inc., the sum of $3,950 in attorney fees and $342.30 in costs. (Total: $4,292.30).

(4) Constant shall pay, before June 15, 1989, to AT&T the sum of $1,440 in attorney fees and $342.30 in costs. (Total: $1,782.30).

(5) This order includes individual judgements against Constant and in favor of Texas Instruments, Inc., in the amount of $13,914.30, in favor of Fujitsu Ltd and Fujitsu Microelectronics, Inc., in the amount of $23,312.30, in favor of NEC Electronics, Inc., and Analog Devices, Inc., in the amount of $4,292.30, and in favor of AT&T in the amount of $1,782.30.

(6) The judgements here entered may be enforced by execution procedures in the Central District of California or in such other place as may be lawfully appropriate.

FOR THE COURT

Howard T. Markey, Chief Judge

May 11, 1989

A P P E N D I X B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES CONSTANT,

Plaintiff,

v.

ADVANCED MICRO-DEVICES, INC. et als

Defendants.

CV No. 88-00784 SVW (Bx)
ORDER DISMISSING AMENDED
COMPLAINT WITH PREJUDICE

Plaintiff James Constant, a pro se litigant, commenced this patent infringement action against various corporate defendants, on February 16, 1988. The initial complaint contained general allegations barely sufficient under the liberal pleading rules contained in the Federal Rules of Civil Procedure. In an effort to ensure that this litigation proceeded in an efficient manner, the Court ordered plaintiff to amend his complaint pursuant to the following

instructions:

> First, Plaintiff must specifically identify each of the Defendant's allegedly infringing products. Second, Plaintiff must particularly allege how the allegedly infringing products infringe his patent. That is, Plaintiff must identify the particular elements of his patent which are infringed, as well as how those elements are infringed by each allegedly infringing product. Third, Plaintiff should be particularly mindful about limiting his allegations of infringement to elements within the scope of his patent. If Plaintiff makes infringement allegations which exceed the scope of his patent, the Court will impose sanctions.

As the Court made clear to plaintiff on October 3, 1988, the repleading order was not entered because the complaint was insufficient under the liberal pleading rules applicable in federal court. Rather, the Court wanted to get the litigation off on a smooth footing and avoid needless rounds of discovery which would undoubtedly occur if plaintiff's allegations were not pinpointed. Plaintiff made a good

faith effort to comply with the Court's repleading Order by filing an amended complaint. However, the amended complaint was once again deficient in that it failed to specifically allege which claims of his patent he contends were infringed. As plaintiff had made a good faith effort to comply with the Court's Order, plaintiff was given a final chance to replead his complaint. Instead of making any further good faith attempts to replead his complaint, plaintiff filed a document entitled "Plaintiff's Response to Court's Order to Replead Amended Complaint". In that submission, plaintiff continued to assert that the amended complaint was sufficient under the liberal pleading rules. Finally, in bold defiance of this Court, plaintiff stated:

> For the reasons of record, plaintiff regards the Court's two Orders dis-

> missing the original and amended complaints as erroneous and in excess of the Court's powers and authority. Plaintiff therefore declines to make the amendment called for by the Court's order at the hearing on 29 August, 1988 and elects to stand on his amended complaint as filed.

After stating to plaintiff in Court on October 3, 1988 why the Court was requiring him to replead his complaint, and after making clear to plaintiff that his complaint did meet the simple pleading rules applicable in federal court, the Court asked plaintiff whether he still intended to disobey the Court's Order by refusing to amend his complaint. He responded affirmatively, whereupon the Court ordered the complaint dismissed with prejudice.

As set forth herein, this Court was plainly within its authority in requiring plaintiff to replead his complaint even though the complaint may have been tech-

nically sufficient under the Federal Rules of Civil Procedure. Furthermore, the Court has the authority pursuant to FRCP 41(b) to dismiss the amended complaint with prejudice for plaintiff's refusal to comply with an Order of this Court.

A. The Court's Repleading Orders Were Proper

Plaintiff contends that the Court's repleading Orders were improper. Essentially, he argues that his complaint as amended is sufficient under the liberal federal pleading rules and that therefore, this Court cannot dismiss the complaint for failure to amend. As set forth below, this argument is meritless.

Plaintiff's original complaint was drafted to comply with the pleading forms attached to the Federal Rules of Civil Procedure. As such, it clearly was suffi-

cient to withstand a motion to dismiss for failure to state a claim. However, given plaintiff's pro se status, the Court was of the view that a more specific pleading would better enable the defendants to respond to the allegations, and would provide a clearer framework within which to conduct discovery. Accordingly, the Court ordered plaintiff to amend his complaint pursuant to the repleading order set forth above. Plaintiff filed his amended complaint on June 30, 1988. While this complaint did partially comply with the repleading Order by specifying which of defendant's products allegedly infringed the patent, the complaint once again failed to set forth the specific elements or claims of his patent which allegedly were being infringed. The amended complaint merely referred to a

diagram of the patent. Since the complaint continued to be deficient, the Court gave plaintiff one final opportunity to replead. As stated above, plaintiff refused.

It has long been settled that while the forms contained in the Appendix of Forms attached to the Federal Rules of Civil Procedure "are intended to indicate the simplicity and brevity of statement which the rules contemplate", FRCP 84, compliance with the forms will not prevent a dismissal for failure to plead specific facts. Washburn v. Moorman Mfg Co., 25 F.Supp. 546 (S.D. Cal. 1938). Thus, plaintiff's assertions that his pleading complies with Form 16 entitled "Complaint for Infringement of Patent" will not prevent a dismissal for failure to comply with this Court's Order to plead with greater specificity.

It has also long been settled that it is entirely proper for a plaintiff in a patent infringement action to be required to allege which claims of his patent he alleges to have been infringed. See Marvel Slide Fastener Corp. v. Klozo Fastener Corp., 80 F.Supp. 366 367 (SDNY 1948). This is so notwithstanding that the plaintiff's complaint may be sufficient to withstand a motion to dismiss. Id. This Court was well within its authority to enter the repleading Order in this case.

Finally, on a more general level, a Federal District Judge may, in appropriate cases, require a pro se plaintiff to follow procedures which go beyond those required by the Federal Rules of Civil Procedure. See e.g., Miller v. Los Angeles County Board of Education, 799 F2d 486 (9th Cir. 1986)(Federal District Judge

properly required pro se civil rights litigant to submit in advance questions which would be asked at trial in order that defendant could object before trial). Often, such procedures will be necessary to ensure that the litigation proceeds in an organized fashion, given that the plaintiff does not have the benefit of counsel. In the present case, the Court, while recognizing that the complaint was technically sufficient, knew from past experience[1]/ that until the complaint was

---

1/ This Court recently granted summary judgement in another patent infringement case brought by Mr. Constant. In a published opinion, the Federal Circuit noted: "The district court went to great lengths to be fair and has shown great patience in the face of arguments and tactics that would have been improper if advanced by a lawyer". Constant v. Advanced Micro-Devices, Inc., 848 F2d 1560,1572 (Fed. Cir. 1988). The Court is very much aware of Mr. Constant's past litigation tactics and it is with this background that the present course of procedure was adopted for this case.

more detailed, the defendants would not be in a position to properly respond to the allegations and any discovery would be completely disorganized. Therefore, in view of plaintiff's pro se status, the Court's repleading Orders were simply for purposes of efficient litigation management, and were appropriate.

B. Dismissal With Prejudice is Appropriate in this Case

As set forth above, plaintiff boldly refused to comply with the Court's second repleading Order contending that such Order was beyond the Court's authority. Plaintiff's statement to this Court that he was electing to stand on his amended complaint as filed showed a great disrespect for an Order of this Court. While a pro se litigant may not be well versed in the proper tone to employ when objecting to a Court Order, a litigant in federal court should,

at a minimum, show due respect for the Court and its Orders. Under FRCP 41(b), upon motion of the defendants, the Court can dismiss the complaint "for failure of the plaintiff to . . . comply with . . . any order of court . . .". Dismissal has been held proper in a case such as this where a plaintiff had failed to comply with an order that he file an amended complaint setting out the particular facts on which he relied. Finley v. Rittenhouse, 416 F2d 1186 (9th Cir. 1969). See also Burgs v. Sissel, 745 F2d 526 (8th Cir. 1984)(Dismissal with prejudice on the Court's own motion not abuse of discretion in civil rights action brought by pro se litigant where plaintiff failed to comply with Court's pretrial order after being given three opportunities to comply and after being warned that failure

to comply could result in dismissal). Therefore, given plaintiff's failure to comply with the Court's repleading Order, and his complete lack of respect for an Order of this Court, the amended complaint is hereby dismissed with prejudice.

The Court is aware that dismissal with prejudice is a severe sanction to impose on a pro se litigant. However, Mr. Constant is not unfamiliar with the proper methods of proceeding in federal court and he has been sanctioned before for his contumaceous conduct. Those sanctions were recently affirmed by the United States Court of Appeals for the Federal Circuit, which Court imposed its own sanctions against Mr. Constant. Constant v. Wilson, No. 88-1195 (Fed. Cir. August 25, 1988) (unpublished opinion available on WESTLAW). In addition, in a recent opinion affirming

this Court's entry of summary judgement against Mr. Constant, the Federal Circuit cautioned Mr. Constant that sanctions could be imposed if he persisted in his improper behabior. Constant v. Advanced Micro-Devices, Inc., 848 F2d 1560,1572 (Fed. Cir. 1988). If Mr. Constant wishes to pursue any further claims in federal court, he must learn to abide by the Court's rules and procedures. His pro se status will not shield him from the consequences which any federal litigant must face if he or she insists on pursuing a course of conduct which shows a complete lack of respect for the federal courts.

C. Dismissal of All Defendants with Prejudice is Appropriate

On September 22, Mr. Constant dismissed defendants AT&T, Floating Point Systems, Analog Devices, Inc., NEC Elec-

tronics, Inc., and Fujitsu Microelectronics, Inc. These defendants were purportedly dismissed without prejudice pursuant to FRCP 41(a)(1) which allows the dismissal of an action without court order "by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgement". Technically, therefore, the Court's Order dismissing the amended complaint with prejudice made in open court on October 3, 1988 applied only to the remaining defendants, Texas Instruments, Inc., and Fujitsu, Ltd. At the October 3 hearing, the Court stated that it would allow the defendants who were dismissed without prejudice to file motions to vacate the earlier dismissal order and enter dismissal with prejudice as to them. After considering these motions, and for the reasons set forth below, the Court hereby VACATES the dismis-

sal without prejudice and enters this DISMISSAL WITH PREJUDICE as to all defendants.

Defendants Analog Devices, Inc., NEC Electronics, Inc. and AT&T, had already filed an answer to the original complaint when plaintiff filed his notice of dismissal. While these three defendants did not file an answer to the amended complaint, where, as here, the amended complaint is substantively the same as the original complaint, an answer to the original complaint will terminate plaintiff's ability to voluntarily dismiss the action without prejudice under FRCP 41(a)(1). Armstrong v. Frostie Co., 453 F2d 914, 916 (4th Cir. 1971); Tedeschi v. Barney, 95 FRD 182,183 (SDNY 1982).

Defendant Floating Point Systems, Inc. (FPS), did not answer the original complaint. However, in its opposition to

plaintiff's motion for summary judgement filed on May 23, 1988, FPS requested that the Court grant summary judgement in its favor, asserting that the evidence demonstrated the absence of any genuine issue as to the lack of infringement. Although this request for entry of summary judgement was not made in a formal noticed motion, the Court finds that such a request was sufficient to terminate plaintiff's unilateral right to dismiss the action against FPS without prejudice under FRCP 41(a).

Defendant Fujitsu Microelectronics, Inc. also seeks to have the Order of dismissal without prejudice vacated. This defendant concedes it has not answered either the original or the amended complaint, nor has it brought a motion for summary judgement. Fujitsu urges this Court to vacate

the earlier dismissal Order under the "equitable" exception to Rule 41(a)(1) announced in Harvey Aluminum v. American Cyanamid Co., 203 F2d 105 (2d Cir.), cert den 345 US 964 (1953). In Harvey, the Second Circuit recognized that, in certain situations, although a defendant has not served an answer to the complaint or a motion for summary judgement, often the litigation will have advanced beyond the stage where it would be equitable to allow the plaintiff to voluntarily dismiss the action. The Court adopted this exception in order to advance the essential purpose of Rule 41(a)(1) "of preventing arbitrary dismissals after an advanced stage of a suit has been reached". Id at 108. The Ninth Circuit has recently affirmed the availability of this exception in appropriate cases. See Hamilton v. Shearson-

Lehman American Express Inc., 813 F2d 1532, 1534 (9th Cir. 1987).

The present litigation has clearly proceeded well beyond an "advanced" stage such that it would be contrary to the purposes of Rule 41(a)(1) to allow plaintiff to voluntarily dismiss Fujitsu Microelectronics, Inc. without prejudice. As Fujitsu correctly points out, there have been several motions made, including a motion for summary judgement, motions to dismiss, a motion for default and sanctions motions. Additionally, the defendants have had to defend a number of frivolous motions brought by Mr. Constant. If ever there was a case which called for an application of the Harvey exception, this is it.

Accordingly, for the reasons set forth herein, the Court hereby VACATES the Order of Dismissal entered on September 22, 1988

dismissing Analog Devices, Inc., AT&T, Floating Point Systems, Inc., Fujitsu Microelectronics, Inc., and NEC Electronics without prejudice. The amended complaint is hereby DISMISSED WITH PREJUDICE as to all defendants.

IT IS SO ORDERED

DATED: October 20, 1988

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES CONSTANT,

Plaintiff,

v.

ADVANCED MICRO-DEVICES, INC. et als

Dedendants

CV 88-784 SVW
ORDER GRANTING TEXAS INSTRUMENT'S
MOTION FOR SANCTIONS

On September 13, 1988, 1988, defendant Texas Instruments, Inc. ("TI") moved for sanctions pursuant to FRCP 11 against plaintiff for plaintiff's frivolous conduct in requesting the entry of default against TI after TI had already answered the amended complaint and after plaintiff admitted this fact in his motion for default against all defendants other than TI filed on July 25, 1988. On October 3, 1988, the

Court granted TI's motion.

Accordingly, plaintiff shall pay TI sanctions in the amount of $1,500 to compensate TI for having had to defend plaintiff's frivolous request for entry of default.

IT IS SO ORDERED

DATED: February 9, 1989

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT was served on all parties by mailing first class a true and correct copy to them addressed as follows:

Craig Summers
Pretty, Schroeder, Bruggeman & Clark
444 South Flower Street, Suite 2000
Los Angeles, CA 90071

Attorneys for defendants AD and NEC

Bless Young
Fulbright Jaworski & Reavis McGrath
700 South Flower Street
Los Angeles, CA 90017

Attorneys for defendant AT&T

Richard Fybel
Morrison & Foerster
333 South Grand Avenue 38 fl
Los Angeles, CA 90071

Attorneys for defendants FMI and Fujitsu, Ltd

Jas Adams
Acker, Underwood & Smith
2100 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204

Attorneys for defendants FPS

Paul Malingagio
Sheppard, Mullin, Richter & Hampton
333 South Hope Street, 48th fl
Los Angeles, CA 90071

Attorneys for defendant TI

James Constant
1603 Danbury Dr
Claremont, CA 91711
(714) 624-1801

pro se plaintiff

Date: 27 May, 1989

(2)

Supreme Court, U.S.
FILED
JUN 28 1989
JOSEPH F. SPANIOL, JR
CLERK

No. 88-1933

IN THE

Supreme Court of the United States

October Term, 1988

JAMES CONSTANT,

Petitioner,

vs.

ADVANCED MICRO-DEVICES, INC., ANALOG DEVICES, INC., AT & T, FLOATING POINT SYSTEMS, INC., FUJITSU, LTD., FUJITSU MICROELECTRONICS, INC., NEC ELECTRONICS, INC. and TEXAS INSTRUMENTS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

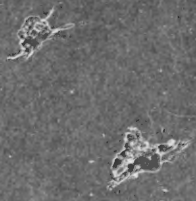
BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

ADRIAN M. PRUETZ
MORRISON & FOERSTER
333 South Grand Avenue
38th Floor
Los Angeles, California 90071
(213) 626-3800
Attorneys for Fujitsu, Limited and Fujitsu Microelectronics, Inc.

Submitted on behalf of all Respondents

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

29 pp



QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner, by filing an amended complaint, waived any right he had to challenge the District Court's dismissal without prejudice of his original complaint?

2. Whether the District Court abused its discretion in ordering petitioner to replead his original complaint with greater specificity, when the complaint was vague and ambiguous and respondents could not adequately frame a response, petitioner was proceeding *pro se*, and petitioner had a history of abusive litigation practices?

3. Whether petitioner was entitled to voluntarily dismiss parties who had answered his original complaint, moved for summary judgment, or had otherwise been involved in protracted litigation with petitioner?

4. Whether the District Court abused its discretion in dismissing petitioner's amended complaint with prejudice under Fed. R. Civ. P. 41(b), for petitioner's willful and continued refusal to comply with an order of the court?

5. Whether the District Court's dismissal of petitioner's patent infringement action against private party defendants was a taking of property without just compensation, in violation of the Fifth Amendment?

6. Whether the District Court's dismissal of petitioner's action pursuant to Fed. R. Civ. P. 41(b), after a full hearing, for willful refusal to comply with a court order, violated petitioner's due process rights?

7. Whether the District Court and Court of Appeals violated petitioner's due process and equal protection rights by ordering petitioner to pay costs and attorneys' fees pursuant to Fed. R. Civ. P. 11 and Fed. R. App. P. 38, after petitioner brought a frivolous request for default judgment against one defendant in the District Court, and brought an unfounded and vexatious appeal of the District Court's dismissal of all defendants in the Appellate Court?

8. Whether the issues presented are appropriate for review on writ of certiorari, when they are not novel, important questions, and address only frivolous claims?

RULE 28.1 STATEMENT

Eastern Telephone and Telegraph is a non-wholly owned subsidiary of respondent AT&T. There are no other non-wholly owned subsidiaries, parent companies, or affiliates of the respondents that need to be listed pursuant to Supreme Court Rule 28.1.

TABLE OF CONTENTS.

	Page
Questions Presented for Review	i
Rule 28.1 Statement	ii
Table of Contents	iii
Table of Cases and Other Authorities	v
Statement of Related Cases	viii
Opinion Below	1
Jurisdiction	1
Statement of the Case	2
Summary of Argument	5
Argument	6
I. Petitioner Waived Any Right to Object to the Order Dismissing His Original Complaint and Ordering Him to Replead	6
II. The District Court Did Not Abuse Its Discretion in Dismissing Petitioner's Complaint Without Prejudice and Ordering Him to Replead With Greater Specificity	7
III. Since Respondents Had Either Answered Petitioner's Complaint, Moved to Dismiss, or Otherwise Participated in Protracted Litigation, Petitioner Could Not Voluntarily Dismiss Them From the Action	8
A. The District Court Had Jurisdiction to Determine If Petitioner's Notice Of Voluntary Dismissal Was Proper	9
B. Petitioner's Notice of Dismissal was Improper and Untimely	9

Page

IV. The Federal Circuit Correctly Found That the District Court Did Not Abuse Its Discretion in Dismissing Petitioner's Complaint With Prejudice 11

A. The Standard of Review 11

B. The District Court Had Ample Authority to Dismiss This Action With Prejudice for Petitioner's Willful Refusal to Obey an Order of the Court 11

V. The District Court's Involuntary Dismissal of Petitioner's Complaint Did Not Amount to a Taking of Property in Violation of the Fifth Amendment 12

A. Petitioner Has Failed to Preserve the "Taking" Issue 13

B. Petitioner's "Taking" Claim Lacks Merit 13

VI. Dismissal Pursuant to Rule 41(b) Did Not Violate Petitioner's Due Process Rights ... 14

VII. The District and Appellate Courts Did Not Violate Petitioner's Due Process and Equal Protection Rights By Imposing Sanctions 16

A. The District Court Did Not Abuse Its Discretion in Sanctioning Petitioner 16

B. The Appellate Court Did Not Abuse Its Discretion in Sanctioning Petitioner 16

VIII. The Issues Presented Above Are Not Appropriate for Review on Writ of Certiorari .. 18

Conclusion 20

Page

TABLE OF CASES.

Armstrong v. Frostie Company, 453 F.2d 914 (4th Cir. 1971) 9,10
Asberry v. United States Postal Serv., 692 F.2d 1378 (Fed. Cir. 1982) 17
Bulchis v. City of Edwards, 671 F. Supp. 1270 (W.D. Wash. 1987) 10
Burgs v. Sissel, 745 F.2d 526 (8th Cir. 1984) 11
City of Springfield, Mass. v. Kibbe, 480 U.S. 257 (1987) 13
Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560 (Fed. Cir.), *cert. denied*, 109 S. Ct. 228 (1988) 8,15
Crozier v. Fried Krupp Aktiengesellschaft, 224 U.S. 290 (1912) 14
Fed. Trade Comm'n v. Am. Tobacco Co., 274 U.S. 543 (1927) 19
Fendler v. Westgate California Corp., 527 F.2d 1168 (9th Cir. 1975) 11,12
Finley v. Rittenhouse, 416 F.2d 1136 (9th Cir. 1969) 12
Hamilton v. Shearson-Lehman American Express, Inc., 813 F.2d 1532 (9th Cir. 1987) 10
Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953), *cert. denied*, 345 U.S. 964 (1953) 10
Labor Bd. v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 19
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 18
Leesona Corp. v. United States, 599 F.2d 958 (Ct. Cl.), *cert. denied*, 444 U.S. 991 (1979) 14
Link v. Wabash R.R., 370 U.S. 626 (1962) 7
Loux v. Rhay, 375 F.2d 55 (9th Cir. 1967) 6
Marshall v. Barlow's, Inc., 429 U.S. 1347 (1977) ... 14,15

Page

Miller v. Los Angeles County Bd. of Educ., 799 F.2d 486 (9th Cir. 1986) 8
New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345 (1977) 15
Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 13
3 Penny Theater Corp. v. Plitt Theatres, Inc., 812 F.2d 337 (7th Cir. 1987) 15
Rice v. Sioux City Cemetary, 349 U.S. 70 (1955) 18
Sacramento Coca-Cola Bottling Co. v. Local 150 Chauffeurs, 440 F.2d 1096 (9th Cir. 1971), *cert. denied*, 404 U.S. 826 (1971) 6
Schmidt v. Herrman, 614 F.2d 1221 (9th Cir. 1980) 12
Schweiker v. McClure, 452 U.S. 1301 (1981) 14
Sheldon v. Amperex Elec. Corp., 449 F.2d 146 (2d Cir. 1971) 10
Sun-Tek Industries v. Kennedy Sky-Lites, Inc., 865 F.2d 1254 (Fed. Cir. 1989) 17,18
Tedeschi v. Smith, Barney, Harris, Upham & Co., 95 F.R.D. 182 (S.D.N.Y. 1982) 10
Tele-Views News Co. v. S.R.B. TV Publishing Co., 28 F.R.D. 303 (E.D. Pa. 1961) 9
Washburn v. Moorman Mfg. Co., 25 F. Supp. 546 (S.D. Cal. 1938) 7
Wood v. Santa Barbara Chamber of Commerce, Inc., 699 F.2d 484 (1983), *cert. denied*, 465 U.S. 1080 (1984) 11
Van Bronkhorst v. Safeco Corp., 529 F.2d 943 (9th Cir. 1976) 7
Zaldivar v. Los Angeles, 780 F.2d 823 (9th Cir. 1986) 16

Page

OTHER AUTHORITIES.

Fifth Amendment 12
Fed. R. App. P. 38 17
Fed. R. Civ. P.:
Rule 11 16
Rule 41 9
Rule 41(a)(1) 10
Rule 41(b) 11,12,13,14,15
Rule 55 16
Rule 84 7
Sup. Ct. Rule 17(c) 19

STATEMENT OF RELATED CASES

United States Court of Appeals for the Federal Circuit:

No. 88-1101

James Constant v. Advanced Micro-Devices, Inc., et al.

No. 88-1414

James Constant v. Advanced Micro-Devices, Inc., et al.

No. 88-1196

James Constant v. Robert Hillman

No. 88-1198

James Constant v. Marcian Hoff, et al.

No. 88-1197

James Constant v. Hitachi America, Ltd., et al.

No. 88-1195

James Constant v. Stephen Wilson; Robert Hillman

Supreme Court of the United States:

No. 88-308

James Constant v. Advanced Micro-Devices, Inc., et al.

No. 88-1356

James Constant v. Advanced Micro-Devices, et al.

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1933

JAMES CONSTANT,

Petitioner,

vs.

ADVANCED MICRO-DEVICES, INC., ANALOG DEVICES, INC., AT & T, FLOATING POINT SYSTEMS, INC., FUJITSU, LTD., FUJITSU MICROELECTRONICS, INC., NEC ELECTRONICS, INC. and TEXAS INSTRUMENTS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit from which petitioner seeks certiorari is not reported. A copy of that Opinion is attached to Petitioner's Petition for Writ of Certiorari at Appendix A-2 (hereinafter "Pet. App.").

JURISDICTION

The principal judgment of the Court of Appeals was entered on April 11, 1989. (Pet. App. at A-2). A petition for rehearing was denied on May 3, 1989. (Pet. App. at A-7). The judgment of the Court of Appeals for costs and attorneys' fees on appeal was entered on May 11, 1989. (Pet. App. A-10). The petition for writ of certiorari was filed on May 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

This lawsuit commenced on February 16, 1988, when Petitioner James Constant filed a Complaint for Patent Infringement in the Central District of California against Advanced Micro-Devices, Inc. ("AMD"); Analog Devices, Inc. ("Analog Devices"); AT&T; Floating Point Systems, Inc. ("FPS"); Fujitsu Microelectronics, Inc. ("FMI"); Fujitsu Limited ("FJ"); NEC Electronics, Inc. ("NEC"); and Texas Instruments, Inc. ("TI").[1] Petitioner's Complaint generally alleged that respondents had made, used, and sold devices which infringed his United States Patent No. 4,006,351 ('351 Patent), although the Complaint was extraordinarily vague and confusing.

All respondents timely filed either an answer, motion to dismiss, or motion for a more definite statement in response to the Complaint. Petitioner filed diverse motions for summary judgment, judgment on the pleadings, sanctions or to strike against respondents.

On June 13, 1988, Judge Wilson held a hearing on motions by both sides. After oral argument, Judge Wilson denied all petitioner's motions. He granted AMD's motion to dismiss for improper venue. Finally, Judge Wilson granted FMI's motion to dismiss the Complaint, but gave petitioner a chance to replead.

In his June 17, 1988 order, Judge Wilson stated:

> "First, Plaintiff must specifically identify each of the Defendants' allegedly infringing products. Second, Plaintiff must identify the particular elements of his patent which are infringed, as well as how those elements are infringed by each allegedly infringing product. Third, Plaintiff should

[1] The defendants in the District Court action are collectively referred to herein as respondents.

be particularly mindful about limiting his allegations of infringement to elements within the scope of his patent." (Pet. App. at B-3).

Petitioner filed an amended complaint on June 30, 1988. TI filed an answer and counterclaim. However, because the amended complaint did not comply with the repleading order, FMI moved to dismiss it. All of the respondents, including TI, joined in this motion.

Petitioner thereafter filed a motion for entry of default judgment against all defendants except TI and FJ, claiming the motion to dismiss was not an answer. Although TI had answered the amended complaint, Constant subsequently requested that default also be entered against TI. On August 29, 1988, Judge Wilson denied petitioner's default requests, granted FMI's motion to dismiss petitioner's amended complaint without prejudice, and afforded petitioner one more opportunity to file a complaint in compliance with the repleading order.

Additionally, Judge Wilson sanctioned petitioner for his unfounded attempt to take TI's default.

However, petitioner refused to comply with Judge Wilson's repleading order. Instead, on September 16, 1988, petitioner filed a document entitled "Plaintiff's Response to Court's Order to Replead Amended Complaint" wherein he asserted that he considered the District Court's repleading order erroneous and in excess of the court's authority, and that he would not replead. (Pet. App. at B-4 to B-5). On September 22, 1988, petitioner filed a Notice of Dismissal without prejudice as to all defendants except TI and FJ, and this dismissal was entered by the District Court.

On October 3, 1988, Judge Wilson dismissed petitioner's amended complaint with prejudice as to TI and FJ, on the grounds that petitioner had failed to comply with the June 17, 1988 repleading order and had unequivocally stated to the court that he would *not* follow the court's order. On October 24, 1988, pursuant to respondents' motions, Judge Wilson vacated petitioner's voluntary dismissal of certain respondents entered September 22, 1988, and dismissed the amended complaint with prejudice as to all respondents. The order dismissing the amended complaint with prejudice was entered October 31, 1988. (Pet. App. at B-2). The order granting Texas Instruments' motion for sanctions was entered February 9, 1989. (Pet. App. at B-21).

Petitioner appealed these and other District Court orders to the United States Court of Appeals for the Federal Circuit, which affirmed the District Court in all respects. (Pet. App. at A-2). The Federal Circuit held, *inter alia*, that the District Court was wholly within its discretion in dismissing petitioner's complaint with prejudice because of his refusal to obey the District Court's repleading order. (Pet. App. at A-5). Concluding that petitioner's appeal was "completely unfounded and vexatious," the Federal Circuit imposed sanctions against petitioner and ordered him to pay respondents the attorney's fees and costs incurred on appeal.

Constant then filed this petition for writ of certiorari.

SUMMARY OF ARGUMENT

Petitioner has not presented this Court with any issues that would merit review. Petitioner's grievances are all a direct result of his own actions and willful refusal to obey the District Court's second repleading order. Petitioner, by filing an amended complaint, waived any right to object to the dismissal of his original complaint and to the first repleading order. Petitioner's request for default against an answering defendant was frivolous, and the District Court properly imposed sanctions. Furthermore, petitioner's notice of voluntary dismissal was improper and untimely, hence, the District Court did not err in vacating it. Finally, the District Court was completely justified, as the Federal Circuit concluded, in dismissing petitioner's amended complaint with prejudice due to petitioner's outright refusal to obey the court's repleading order. Petitioner's appeal from the District Court's well-founded dismissal was frivolous, and sanctions were properly imposed by the Federal Circuit.

This Court should not reward petitioner's blatant disrespect for the judicial system by granting review.

ARGUMENT

I. Petitioner Waived Any Right to Object to the Order Dismissing His Original Complaint and Ordering Him to Replead.

Petitioner urges this Court to review the District Court's order dismissing his original complaint without prejudice and ordering him to replead. Petitioner's objections to this order were waived, however, when he filed his amended complaint.

The law is well established in the Ninth Circuit and others that by filing an amended complaint, a plaintiff waives any error in the original repleading order. *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Moreover, a party who amends his pleading waives any right to object to a trial court's repleading order which was based on grounds of indefiniteness, incompleteness, insufficiency or other technical defects in the original complaint. *Sacramento Coca-Cola Bottling Co. v. Local 150 Chauffeurs*, 440 F.2d 1096, 1098 (9th Cir. 1971), *cert. denied*, 404 U.S. 826 (1971). Accordingly, petitioner waived any right he may have had to contend that his original complaint was proper and should not have been dismissed, or that the court erred in issuing a specific repleading order. The Federal Circuit need not have even considered the merits of the District Court's June 17, 1988 order dismissing petitioner's complaint and ordering repleading, and its ruling affirming the District Court's decision was correct on this ground alone.

II. The District Court Did Not Abuse Its Discretion in Dismissing Petitioner's Complaint Without Prejudice and Ordering Him to Replead With Greater Specificity.

Petitioner contends that because his complaint was drafted in accordance with Form 16 of the Appendix of Forms of the Federal Rules of Civil Procedure, it was a proper pleading and was sufficient to withstand a motion to dismiss. Petitioner's contention is completely irrelevant, however, since the District Court did not dismiss Petitioner's complaint for failure to state a claim. (Pet. App. at B-3).

The District Court stated, in its October 31, 1988 Order Dismissing Amended Complaint With Prejudice, that although petitioner's original complaint was "barely sufficient" under the liberal pleading requirements in Federal Court (Pet. App. at B-2), the respondents would not be in a position to properly respond to the allegations until the complaint was more detailed. The District Court also found that any discovery would be completely disorganized if the complaint remained in its current indefinite form. (Pet. App. at B-7). The District Court was entitled to so rule:

> It has long been settled that while the forms contained in the Appendix of Forms attached to the Federal Rules of Civil Procedure "are intended to indicate the simplicity and brevity of statement which the rules contemplate," FRCP 84, *compliance with the forms will not* prevent a dismissal for failure to plead *specific facts. Washburn v. Moorman Mfg. Co.*, 25 F. Supp. 546 (S.D. Cal. 1938). (Pet. App. at B-8). (Emphasis added.)

The authority of the court to order repleading is also supplemented by the court's broad inherent power to regulate litigation before it. *See, e.g., Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 951 (9th Cir. 1976).

The District Court was further justified in ordering petitioner to replead given the totality of the circumstances before the Court. Petitioner was a *pro se* plaintiff with a long history of filing meritless claims and taking frivolous positions, of which the District Court was well aware. *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1572 (Fed. Cir. 1988). In this case, shortly after filing the complaint, petitioner filed a host of frivolous motions against respondents, for summary judgment, judgment on the pleadings, sanctions and to strike, all of which were properly denied by the District Court. (Pet. App. at A-4). It was therefore well within the discretion of the District Court to require petitioner to follow procedures beyond the bare bones forms approved by the Federal Rules of Civil Procedure. *Miller v. Los Angeles County Bd. of Educ.*, 799 F.2d 486, 488 (9th Cir. 1986).

Given petitioner's prior litigation tactics and *pro se* status, the District Court appropriately exercised its inherent authority to control the litigation before it by dismissing the original complaint for vagueness and ordering petitioner to replead. The Federal Circuit properly concluded that petitioner's contentions on appeal were "totally unfounded," (Pet. App. at A-3), and "totally fail to manifest even an *appearance* of an abuse of discretion by the District Court." *Id.*

III. Since Respondents Had Either Answered Petitioner's Complaint, Moved to Dismiss, or Otherwise Participated in Protracted Litigation, Petitioner Could Not Voluntarily Dismiss Them From the Action.

Petitioner argues that his notice of voluntary dismissal divested the District Court of its jurisdiction over all respondents except FJ and TI, who were not included in the voluntary dismissal. Petitioner erroneously concludes

that after he filed the notice, the District Court was without jurisdiction to enforce its interlocutory orders or to dismiss the amended complaint with prejudice as to *all* respondents. However, petitioner ignores the fact that the District Court vacated his notice of dismissal because the notice was improper and untimely, and therefore ineffective to divest the district court of its jurisdiction over the litigation.

A. The District Court Had Jurisdiction To Determine If Petitioner's Notice Of Voluntary Dismissal Was Proper.

A District Court retains jurisdiction to determine if a plaintiff's notice of voluntary dismissal is filed in compliance with Fed. R. Civ. P. 41. Where a plaintiff's notice of voluntary dismissal is untimely, the notice of dismissal is a nullity. *Tele-Views News Co. v. S.R.B. TV Publishing Co.*, 28 F.R.D. 303, 308 (E.D. Pa. 1961) (on motion for reargument). If the court determines that a notice of voluntary dismissal was improperly filed, and is therefore a nullity, it is entirely appropriate for the court to vacate the voluntary dismissal. *Armstrong v. Frostie Company*, 453 F.2d 914, 916 (4th Cir. 1971).

For the reasons discussed below, Judge Wilson properly determined that petitioner's notice of dismissal was improper and untimely, and therefore a nullity. It was thus within the court's discretion to vacate the notice of dismissal and enter an order dismissing the case with prejudice against *all* respondents.

B. Petitioner's Notice of Dismissal was Improper and Untimely.

The District Court was within its discretion in vacating petitioner's notice of dismissal and dismissing the action with prejudice as to Analog, NEC and AT&T, since they each filed answers to petitioner's original

complaint before petitioner attempted to voluntarily dismiss them. *Armstrong v. Frostie Co.*, 453 F.2d 914, 916 (4th Cir. 1971); *Tedeschi v. Smith, Barney, Harris, Upham & Co.*, 95 F.R.D. 182, 183 (S.D.N.Y. 1982).

Furthermore, the District Court properly vacated the notice of dismissal as to FPS, since FPS had requested summary judgment in its memorandum opposing petitioner's motion for summary judgment. An informal request for summary judgment is the equivalent of a formal motion for summary judgment, *Bulchis v. City of Edwards*, 671 F. Supp. 1270, 1271 (W.D. Wash. 1987), and can terminate petitioner's right to unilaterally dismiss. *See Sheldon v. Amperex Elec. Corp.*, 449 F.2d 146, 147 (2d Cir. 1971) (a motion for summary judgment, *or the equivalent*, can terminate a unilateral right to dismiss).

Entering a dismissal with prejudice as to FMI was also appropriate under the equitable exception to Fed. R. Civ. P. 41(a)(1) set forth in *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105, 108 (2d Cir. 1953), *cert. denied*, 345 U.S. 964 (1953) and acknowledged in *Hamilton v. Shearson-Lehman American Express, Inc.*, 813 F.2d 1532, 1534 (9th Cir. 1987). As the District Court correctly recognized, at the time of petitioner's notice of dismissal, the "litigation [had] clearly proceeded well beyond an 'advanced' stage such that it would be contrary to the purposes of Rule 41(a)(1) to allow plaintiff to voluntarily dismiss [FMI] without prejudice." (Pet. App. at B-19).

After pointing out the number of motions filed by petitioner, and the considerable burden petitioner had placed on FMI (and the other defendants), the District Court concluded: "If ever there was a case which called for an application of the *Harvey* exception, this is it."

(Pet. App. at B-19). The District Court was well within its discretion in so deciding, and the Federal Circuit properly affirmed the District Court's decision to vacate the voluntary dismissal and enter an order dismissing the amended complaint with prejudice as to all respondents. (Pet. App. at A-5 to A-6).

IV. The Federal Circuit Correctly Found That the District Court Did Not Abuse Its Discretion in Dismissing Petitioner's Complaint With Prejudice.

A. The Standard of Review.

"The decision to dismiss for failure to comply with an order [of the court] is within the discretion of the trial judge." *Fendler v. Westgate California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975). Absent any abuse of discretion on the part of the district court in dismissing a complaint for disobedience of a court order, the reviewing court should affirm the district court's decision. *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 699 F.2d 484, 485 (1983), *cert. denied*, 465 U.S. 1080 (1984).

B. The District Court Had Ample Authority to Dismiss This Action With Prejudice for Petitioner's Willful Refusal to Obey an Order of the Court.

If a plaintiff disobeys an order of the court, the court is authorized under Fed. R. Civ. P. 41(b) to enter an involuntary dismissal. *Wood*, 699 F.2d at 485. The court may dismiss plaintiff's action under Rule 41(b) on its own motion. *Burgs v. Sissel*, 745 F.2d 526, 528 (8th Cir. 1984). As the Ninth Circuit has recognized, district courts have an inherent authority to dismiss an action in order to protect the integrity of the court's orders and to ensure the orderly administration of justice. *Fendler*, 527

F.2d at 1170. Dismissal is appropriate when a plaintiff is ordered to file an amended complaint setting out the facts on which he relies, and he fails to do so. *Finley v. Rittenhouse*, 416 F.2d 1186, 1187 (9th Cir. 1969).

The District Court was within its discretion in dismissing Petitioner's amended complaint with prejudice as a result of Petitioner's willful refusal to comply with the court's repleading order. Fed. R. Civ. P. 41(b). *Schmidt v. Herrman*, 614 F.2d 1221, 1224 (9th Cir. 1980). Petitioner admits that it would have been a simple matter to comply. (Pet. at 9). There is no question of inadvertence or misunderstanding. In petitioner's unauthorized "Response to Court's Order to Replead Amended Complaint", he boldly asserts his intention to defy the court's repleading order. (Pet. App. at B-4 to B-5). The court was amply justified in dismissing the amended complaint with prejudice.

Given petitioner's complete lack of respect for the court and its orders, the Federal Circuit was more than justified in affirming the District Court's dismissal with prejudice. (Pet. App. at A-6). Not only did the Federal Circuit find that the District Court acted well within its discretion in all respects, (Pet. App. at A-6), it found that petitioner's appeal from the District Court's decision was "completely unfounded and vexatious . . ." and ordered petitioner to pay costs and attorney's fees to respondents. (Pet. App. at A-6).

V. The District Court's Involuntary Dismissal of Petitioner's Complaint Did Not Amount to a Taking of Property in Violation of the Fifth Amendment.

Petitioner contends that the District Court's involuntary dismissal of his patent infringement action against private party defendants constitutes a taking of

property without just compensation in violation of the Fifth Amendment. He erroneously reasons that this dismissal with prejudice has diminished the value of his patent, since it operates as an adjudication on the merits, and he can no longer "exploit his invention." (Pet. Brief at 21). Petitioner's contention has no merit.

A. Petitioner Has Failed to Preserve the "Taking" Issue.

Petitioner failed to raise his "taking of property" argument before the Federal Circuit. The Supreme Court has stated that it "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258 (1987). Although the Court has discretion to decide an issue despite petitioner's failure to preserve it, no appropriate equitable considerations exist in this case. *See, e.g., Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (considering an issue not raised at trial when petitioner argued issue on appeal and respondent failed to object until oral argument in Supreme Court).

B. Petitioner's "Taking" Claim Lacks Merit.

Apart from the above procedural defect, petitioner's "taking" argument wholly lacks merit, representing nothing more than petitioner's confusing his patent infringement claim against private respondents with his objections to the District Court's involuntary dismissal of his case under Fed. R. Civ. P. 41(b). An order of dismissal of a patent infringement complaint by a court of competent jurisdiction is *not* an unconstitutional taking of property. Otherwise, every time a plaintiff lost a patent infringement case, it would be followed by a claim of unconstitutional taking.

The only context in which the government could be held liable for an unconstitutional taking is if the government is accused of patent infringement. "The theory for recovery against the government for patent infringement is not analogous to that in litigation between private parties. When the government has infringed, it is deemed to have 'taken' the patent license under an eminent domain theory." *Leesona Corp. v. United States*, 599 F.2d 958, 964 (Ct. Cl.), *cert. denied*, 444 U.S. 991 (1979).

Thus, at the most basic level, petitioner must allege governmental infringement in order for his "taking" claim to lie against a court of the United States. *Crozier v. Fried Krupp Aktiengesellschaft*, 224 U.S. 290, 304 (1912); *Leesona Corp.*, 599 F.2d at 965. Petitioner has not alleged any such governmental action. Petitioner's claimed "taking" is the District Court's use of Fed. R. Civ. P. 41(b), the purpose of which is to sanction plaintiffs who violate court orders by dismissing their actions. Petitioner's "taking" argument is clearly out of context, and meritless.

VI. Dismissal Pursuant to Rule 41(b) Did Not Violate Petitioner's Due Process Rights.

Petitioner erroneously asserts that the District Court and the Federal Circuit violated his due process rights by dismissing his action without allowing him a hearing on the merits of his infringement claim. As previously stated, the court acted pursuant to Fed. R. Civ. P. 41(b), which permits involuntary dismissal for failure to comply with a court order. The Federal Rules of Civil Procedure are an Act of Congress, and are presumptively constitutional. *Schweiker v. McClure*, 452 U.S. 1301, 1303 (1981); *Marshall v. Barlow's, Inc.*, 429 U.S. 1347,

1348 (1977). "Absent compelling equities on the other side," which are not present here, petitioner's due process claim fails. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1352 (1977). Moreover, petitioner was afforded numerous hearings before the District Court on the issue of dismissal of his complaint.

The Federal Circuit recently addressed this point in a different action by the same petitioner against the same defendants as in this case. In *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir.), *cert. denied*, 109 S. Ct. 228 (1988), and the Federal Circuit stated, "It is unambiguously clear that federal judicial proceedings, with their extensive notice, opportunity to be heard, and procedural protections, satisfy the constitutional requirement of procedural due process required for the invalidation of a patent." *Id.* at 1565. *Accord, 3 Penny Theater Corp. v. Plitt Theatres, Inc.*, 812 F.2d 337 (7th Cir. 1987) (calling dismissal with prejudice a harsh sanction but a necessary tool).

As set forth above, the District Court did not abuse its discretion in applying Rule 41(b) in this case. The court found petitioner's complaint so vague and ambiguous that respondents could not formulate an answer and discovery would be completely disorganized. Thus, the District Court ordered petitioner to replead and delineated exactly how petitioner should change the complaint. When petitioner's next complaint did not conform with the order, the District Court gave him another opportunity to comply. However, petitioner expressly refused to comply. Petitioner was given ample opportunity to be heard. The District Court was justified in dismissing the action with prejudice under these circumstances, as the Federal Circuit held.

VII. The District and Appellate Courts Did Not Violate Petitioner's Due Process and Equal Protection Rights By Imposing Sanctions.

Petitioner claims that the District Court and Federal Circuit violated his due process and equal protection rights by requiring him to pay costs and attorneys' fees. Sanctions have been upheld in cases with similar facts, as set forth below.

A. The District Court Did Not Abuse Its Discretion in Sanctioning Petitioner.

Petitioner contends that the District Court should not have ordered him to pay $1,500 in sanctions to defendant Texas Instruments. The court ordered this sanction for petitioner's "frivolous conduct in requesting the entry of default against TI after TI had already answered the amended complaint." (Petitioner, App. B-21). Such conduct warrants sanctions under Fed. R. Civ. P. 11.

Under Rule 11, the pivotal inquiry is whether a reasonable attorney would have signed the request for default, believing it is "well grounded in fact and is warranted by existing law or a good faith argument . . . ." Fed. R. Civ. P. 11. *See generally, Zaldivar v. Los Angeles,* 780 F.2d 823 (9th Cir. 1986). Filing a request for default *after* an answer has been filed is so contrary to the fundamental principles of procedure that no reasonable attorney would have signed petitioner's request for default. *See* Fed. R. Civ. P. 55.

B. The Appellate Court Did Not Abuse Its Discretion in Sanctioning Petitioner.

Petitioner contends that the Federal Circuit abused its discretion in ordering him to pay the costs and attorneys' fees on appeal of the six respondents. The

court properly ordered this, finding that "[i]n filing and maintaining this completely unfounded and vexatious appeal, Constant has subjected appellees to unnecessary expenditures and has wasted the resources of this court." (Pet. App. A-4).

Petitioner erroneously contends that the Federal Circuit could not impose these sanctions without first giving him an opportunity to respond. However, in 1982, the Federal Circuit explicitly adopted Fed. R. App. P. 38 and stated, "After the date of this opinion, a frivolous appeal filed or proceeded with in this court, will result in imposition of damages and costs upon appellant and counsel in accordance with Rule 38." *Asberry v. United States Postal Serv.*, 692 F.2d 1378, 1382 (Fed. Cir. 1982). Subsequent cases have interpreted this to mean that "neither notice to [the party] against whom the fees and costs were assessed nor a hearing [is] required" when the court awards fees and costs pursuant to Rule 38. *Sun-Tek Industries v. Kennedy Sky-Lites, Inc.*, 865 F.2d 1254, 1255 (Fed. Cir. 1989).

Petitioner also claims the court abused its Rule 38 powers, contending that such sanctions are justified only if Congressional policy and case law both are clearly contrary to his position, and that Congressional policy favors patent actions. However, the District Court did not dismiss petitioner's action merely because he sought to enforce a patent, but because he repeatedly refused to comply with the court's order. Moreover, Congressional policy clearly disfavors bringing frivolous appeals, as the Federal Circuit determined this appeal to be. *See Sun-Tek*, 865 F.2d at 1255.

Petitioner also claims that the attorneys' fees and costs imposed were unreasonable. The Federal Circuit has held that "[o]rdinarily the only inquiry in determining

the propriety of the amount of attorney fees to be paid as damages by an appellant who has filed a frivolous appeal is whether the appellee actually incurred the fees sought in defending against the appeal." *Sun-Tek*, 865 F.2d at 1255. In this case, appellees were required to file supporting documentation with their Application for Attorney Fees and Costs. The court reviewed these documents and awarded fees accordingly. (Pet. App. A-9 to A-10).

Finally, petitioner contends that the imposition of attorneys' fees violates his equal protection rights, since "fees are not available to petitioner who does not have enough money to hire attorneys." (Pet. Brief at 32). However, the critical inquiry in awarding attorney's fees is whether the fees claimed actually were incurred. *Sun-Tek, supra.* Since a non-attorney representing himself does not incur attorney's fees, the judicial interest here is fairness to the parties opposing the *pro se*, who incurred substantial attorneys' fees in defending against this frivolous appeal.

VIII. The Issues Presented Above Are Not Appropriate for Review on Writ of Certiorari.

This Court has stated, " '[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' " *Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Petitioner's claims affect only the parties involved, and are meritless. As such, this Court should " 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations.' " *Labor Bd. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951). (quoting *Fed. Trade Comm'n v. Am. Tobacco Co.*, 274 U.S. 543, 544 (1927)). *Accord*, Sup. Ct. Rule 17(c).

CONCLUSION

For the reasons set forth above, respondents submit that a writ of certiorari should not be granted in this case.

Dated: June 23, 1989

Respectfully submitted,

ADRIAN M. PRUETZ
MORRISON & FOERSTER
333 South Grand Avenue
38th Floor
Los Angeles, California 90071
(213) 626-3800
Attorneys for Fujitsu, Limited and Fujitsu Microelectronics, Inc.

Submitted on behalf of all Respondents